Supreme Court of the United States

OCTOBER TERM, 1947

No. 298

In the Matter of
William S. Fenerty

REPLY BRIEF

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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ARGUMENT

The Bar Committee raises certain issues not fully considered in Petitioner's principal brief, which necessitates filing this Reply Brief.

QUESTION II

In the brief of the Petitioner, under Question II, the contention is made that it was a violation of a substantive Federal Right for the court, sua sponte, to quash the appeal without a motion by appellee upon an alleged jurisdictional objection not apparent of record. The Bar Committee, in its brief, avers that the alleged defect was apparent of record. This presents the issue.

The evidence is that the original writ was returnable to the 4th Monday of November, 1946 (R. 401). The context of the Statute makes no restriction as to the time within which the writ must be perfected in the lower court (Appendix A, Petitioner's Brief). The docket entries show that the Certiorari was entered in the lower court on October 22, 1946, under a Nunc Pro Tunc. With consent of the court it was agreed by both parties that the appeal was perfected as of August 6, 1946 (R. 399). To all appearances the petitioner had complied with the Statute and the alleged defect is not apparent of record.

Edmondson v. Bloomshire, 74 U. S. 306, cited by the Bar Committee, is not applicable to the instant case because the writ in the *Edmondson* case was not perfected before the expiration of the term next succeeding the allowance of the appeal.

Tinkoff v. West Publishing Co., 152 Fed. (2nd) 754, and *Jones v. Marion Coal Co.*, 227 Pa. 509, 510, cited by the Bar Committee, are likewise inapplicable to the instant case because, in both of these proceedings, the court had

before it an appeal which *had not been taken* within the prescribed statutory period.

Commonwealth v. Greenfield, 103 Pa. Sup. Ct. 489, cited by the Bar Committee, was an indictment for arson. The docket entries disclose that a verdict was entered on April 28, 1931. Court of Common Pleas Rule #82 provides that a motion for a new trial must be made within four days. The motion was made on May 20, 1931, which was approximately 3 weeks. The motion was overruled and sentence imposed on June 23, 1931. The Certiorari was entered in the lower court on July 23, 1931. The Statute provides that appeals of this nature must be taken within 45 days after sentence (Appendix A, p. 2a, Petitioner's Brief). The context of the Act makes no provision as to when the appeal must be perfected. Nevertheless, the Superior Court states that the appeal was not perfected within the time limited by Statute.

It is submitted that the statement of the court is inaccurate. What the court appears to be trying to say is that the motion for a new trial in the lower court was not taken within the four days prescribed by the Court Rule #82. However, the lower court disposed of the motion upon its merits and the appellate court did not quash the appeal, which it said had not been perfected within the time limited by Statute.

The Bar Committee presents the novel argument that the petitioner received a full hearing upon the reasonableness of the time consumed in perfecting the appeal because the Supreme Court dismissed the petition without explanation. Since none of the averments of the petition are denied, it follows that the delay in perfecting the appeal must be attributed to the laxity of the court or some more sinister reason. Under these circumstances it has been held that the time for perfecting the appeal shall be extended: *United States v. Vigil*, 77 U. S. 423, 425, 426. This adjudication is in line with the Pennsylvania Cases: *Ziegler's*

Petition, 207 Pa. 131, 137; *Koch Election Contest*, 351 Pa. 544, 548; *Layton v. Comp. Board*, 156 Pa. Sup. Ct. 225, 227.

Therefore, it is submitted that the maladministration of the Act of Assembly and disregard of the Rules of Court has been established.

III

In the brief of the Petitioner, under Question III, the contention is made that it is a violation of a substantive Federal Right for three judges to enter a decree under Rule #215 of the Courts of C. P. of Philadelphia County when two of the judges heard only some witnesses; the third judge was absent and a hearing upon exceptions was denied.

The argument, presented in the brief of the Bar Committee, is that the State Supreme Court reviews disbarment proceedings *de novo;* that the petitioner had a fair opportunity to present the facts to that tribunal; and that, for these reasons, the petitioner was not deprived of equal protection and of procedural due process. The argument presented in these proceedings is inconsistent with that which was presented to the State Supreme Court because it was there urged that the credibility of the witnesses and the weight to be given their testimony was exclusively a question for the lower court.[15]

"An examination of the witnesses by the court means seeing and hearing them . . . not a mere reading of the testimony by a judge who neither saw or heard them.": *Commonwealth v. Stauch*, 256 Pa. 620, 101 A. 72. There is no reported case in which the State Supreme Court has permitted an attorney to bring his witnesses before it in order to establish the facts. This would be an exercise of

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[15] See Petitioner's Brief, Appendix F, Appellee's Counter-Statement Question 1.

original jurisdiction beyond the authority conferred upon the court.[16]

Commenting upon this issue, the State Supreme Court has said: "What is meant by reviewing *de novo* is not very intelligible unless it be from that which follows that the court is to hear any new testimony which may be offered by the *complainant*, but not by the court below or any other party, if there can be any others. On the whole it is a curious piece of legislative patchwork. How far the provision that this court shall hear new testimony and decide the case as if it was a new one consists with that article of the Constitution which prohibits the Supreme Court from the exercise of any original jurisdiction, except in a few specified cases, is a question which does not arise as the controversy here is presented fully on the record, and we are not asked to look after it.": *Ex parte Steinman & Hensey*, 95 Pa. 220, 236.

The Bar Committee has drawn an incorrect conclusion from *Moyerman's Case*, 312 Pa. 555. The record of that proceeding in the lower court is: CP #4, June Term 1932, No. 2591. The docket entries disclose that on June 15, 1932, the committee presented a petition under Rule #215. The order of the court was entered on October 6, 1932; the Certiorari was issued by the Supreme Court on October 8, 1932. It was argued April 19, 1933; and the Opinion of the Supreme Court was entered on June 30, 1933. The dates are very material.

It is noted in the record that the hearings were held before Finletter and Heligman, JJ. The order of the Court

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[16] Art. 5, sect. 3, P. S. Title Constitution, page 36, provides that the Supreme Court shall have original jurisdiction "in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State but shall not exercise any other original jurisdiction."

reads: "Judge Brown, being otherwise engaged, took no part in the hearing or disposition of this rule." In the instant case, the court "made it appear" that McDevitt was present although he, like Brown, J., was otherwise engaged.

In the historical note to Rule #215 (Petitioner's Brief, Appendix H, pages 12a and 13a) it is explained that when the Rule was adopted by the court in 1926 no provision was then made as to how many judges shall be present at the hearing of a disbarment proceeding. The Rule was amended on Jan. 11, 1933 (Legal Intelligencer, Jan. 20, 1933). It was then provided by this amendment that a judge of each of the five Common Pleas Courts shall sit at the hearing. Under a second amendment of March 5, 1942, the number of judges required was reduced to three.

Since the Moyerman Case had been heard on June 15, 1932, which was approximately six months prior to the amendment of Jan. 11, 1933, the case is not applicable to the instant case.

In *Hurwitz v. North*, 271 U. S. 40, 42, cited by the Bar Committee, the Statute, which was before the court, provided that "testimony may be taken by deposition to be used in evidence at the trial." The Missouri Court construed the Statute to mean that testimony could be taken on deposition but the party was not entitled to a subpoena to compel the attendance of the witnesses.

Rule #215, which applies to the instant case, recites that "The respondent may summon such witnesses as he desires. . . . After full hearing by the court, at which such evidence as either party desires to present shall be heard. . . ." (Appendix H, p. 9a, Petitioner's Brief). Therefore, under Rule #215 the petitioner in the instant case was entitled to compel the attendance of witnesses by subpoena, and the Hurwitz case has no application to the question involved.

Emmons v. Smitt, 149 Fed. (2nd) 869, 872, cited by the Bar Committee, holds that under the Michigan Law an attorney does not have a property right in his office; that

the Federal District Court was required in that particular proceeding to enforce the Michigan Law; and, by reason of this fact, the Federal District Court did not have jurisdiction in the premises.

To the contrary, the Pennsylvania Courts hold that an attorney has a property right in his office; and that he cannot be deprived of this property unless by a judgment of his peers and the *law of the land: Ex parte Steinman & Hensel*, supra.[17] The term *law of the land* is synonymous with *due process of law:* CJS vol. 16, p. 1142; *Menges v. Dentler*, 33 Pa. 495; *Com. v. O'Keefe*, 298 Pa. 169, 172, 173.

Therefore, the Emmons case is not applicable to a proceeding which originates under the Pennsylvania Law.

In the *Summer's Case*, 325 U. S. 561, cited by the Bar Committee, the Illinois Supreme Court denied an application for permission to practice upon the ground that the applicant would be unable, in good faith, to take the required oath to support the Constitution of the State because of conscientious scruples resulting in unwillingness to serve in the State Militia in time of war.

Various relevant factors distinguish the instant case from the Summer's case. The Bar Committee, in its brief, does not deny that the record in the instant case was altered so as to let it appear that the proceedings were conducted according to Rule #215 of the C. P. Courts of Philadelphia County; that the complainant and his attorney were permitted, by the committee and the court, to meddle with the witnesses; that the court inserted into the record a wholly fictitious statement of facts with reference to the sale of collateral pledged by the complainant with the petitioner as security for payment of services rendered; and that the lower court denied the petitioner a hearing upon exceptions

[17] Art. 1, sect. 9, of the Constitution of Pennsylvania, inter alia, provides that the accused cannot "be deprived of his life, libe.ty or property, unless by the judgment of his peers or the law o fthe land.": PS Title Const. p. 124.

under Court Rules #68 and 69 (Appendix M, Petitioner's Brief).

None of these factors were present in the Summer's case. The same thing may be said with reference to *Selling v. Radford*, 243 U. S. 46, 50; and *Grace v. State Bar of Alabama*, 320 U. S. 708, both of which cases are cited in the brief of the Bar Committee.

CONCLUSION

The brief, submitted by the Bar Committee, presents no obstacle to the issuance of a Writ of Certiorari in these proceedings.

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